

DIVISION I

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
ROBERT J. GLADWIN, JUDGE

CACR05-1298

ROBERT RANDALL ROSS
APPELLANT

JUNE 21, 2006

V.

APPEAL FROM THE HOT SPRING
COUNTY CIRCUIT COURT
[NO. CR2004-241-1]

STATE OF ARKANSAS
APPELLEE

HON. CHRIS E WILLIAMS,
JUDGE

AFFIRMED

A Hot Spring County jury found appellant Robert Randall Ross guilty of possession of methamphetamine, manufacturing methamphetamine, and possession of drug paraphernalia with intent to manufacture methamphetamine. The jury sentenced him to serve an aggregate term of thirty-one years' imprisonment. On May 2, 2005, appellant filed both a motion for a new trial and a Rule 37 petition for postconviction relief. The trial court entered the judgment and commitment order on May 4, 2005. On May 20, 2005, the trial court also entered an order dismissing appellant's Rule 37 petition, and on May 25, 2005, appellant filed a motion to reconsider the denial of his Rule 37 petition. On May 26, 2005, appellant filed his notice of appeal from the judgment and commitment

order, the denial of his Rule 37 petition, the denial of his motion for a new trial,¹ and the denial of his pretrial motion to suppress evidence. On June 1, 2005, the trial court denied appellant's motion to reconsider the denial of his Rule 37 petition and his motion for a new trial. On June 7, 2005, appellant filed an amended notice of appeal to include the denial of his motion for reconsideration of the court's denial of his Rule 37 petition. Appellant raises four points on appeal to this court: (1) he received ineffective assistance of counsel; (2) the trial court clearly erred in denying his motion for a new trial; (3) there was insufficient evidence to convict him in that the circumstantial evidence was not substantial and the accomplice testimony was not corroborated; (4) the trial court committed cumulative errors. We affirm.

Appellant's trial was held on April 28, 2005. In his opening statement, the prosecutor told jurors that he thought methamphetamine was "the most evil drug ever created by mankind." He stated further that the drug was created by the Nazis during World War II. Defense counsel objected on the basis that the prosecutor was expressing a personal opinion and that his comment about Nazis was prejudicial. Although the trial court overruled defense counsel's objection, the judge instructed the jury that opening statements by counsel are not evidence and warned the prosecutor to limit his comments to the issues at hand.

Jerry Toland, Constable of Saline Township in Hot Spring County, testified that on the night of May 22, 2004, he observed a vehicle being driven with no operational tail lights. When Toland activated his blue lights, the vehicle accelerated and then pulled over to the side of the road only to accelerate again. Soon afterwards, the vehicle spun out of control and landed in a ditch. Angela James, the driver, got out of the car

¹At that point, appellant's motion for a new trial had not yet been denied.

immediately, and when she saw the officer's handcuffs, she indicated that she was having an asthma attack. Toland noted that smoke was coming from underneath the car. The officer observed a lot of movement by appellant, who was a passenger, and instructed appellant to keep his hands where they could be seen. According to Toland, appellant must have crawled out of the car's window because the door would not open. Toland then took appellant, who was by that time handcuffed, to the patrol unit, which was twenty to thirty feet away. While Toland was securing appellant in the patrol unit, he saw James removing items from the trunk of her car. Toland instructed James to get away from the vehicle, but she said she was retrieving her belongings before they burned. Although the officer had seen James removing something from the trunk, there was later nothing on the ground next to her.

Deputy Bryan Chaney of the Hot Spring County Sheriff's Department testified that when he arrived he saw Toland dealing with James, who kept dropping to her knees and then standing. Upon being told that she had asthma, Chaney requested and received permission to search for James's inhaler, which she said was in a yellow case. The yellow case was found, but there was no inhaler inside of it. Chaney then noticed near the rear of the vehicle footprints that led up an embankment. According to Chaney, it appeared as though James was trying to get his attention, but he kept following the footprints until he discovered a black toolbox that was emitting smoke. James and appellant were arrested, and the Group Six Narcotics Enforcement Unit was called. Upon further searching the area, officers found a Coleman fuel can under the car along with James's purse that contained her driver's license and marijuana.

Christy Sullivan, a forensic chemist at the Arkansas State Crime Laboratory, testified that she analyzed items found at the scene, including a loaded syringe. She also testified that it was an HCL generator that had been smoking inside the toolbox.

Steve Smith, who worked for Group Six, testified that the syringe was found inside the toolbox. According to Smith, the toolbox also contained a “meth lab.”

Angela James, who had pleaded guilty to the charges filed against her, testified that she and appellant had dated and lived together. She stated that she and appellant had cooked methamphetamine earlier that day and that the HCL generator was still smoking. They had hidden the toolbox in the woods and had just retrieved it when Toland activated his blue lights. James testified that appellant instructed her to flee from Toland. After she wrecked the car, she got the toolbox out of the trunk and hid it again in the woods. James testified that the loaded syringe was not in the toolbox, but rather it was in the vehicle. Later, she stated that she did not know where the syringe was found. James also testified that she was afraid of appellant and had gotten a tooth knocked out at some point during their relationship. Defense counsel moved for a directed verdict on the basis that James’s accomplice testimony was insufficient to convict appellant because other evidence, considered independently, did not establish the crime and did not tend to connect appellant to the commission of the crime. Counsel further argued that there was insufficient evidence to show that appellant possessed the contraband. The trial court denied the motion.

Appellant then took the stand to testify on his own behalf. According to appellant, he had been at his mother’s house waiting for James, who was late again, to pick him up so they could stay together for a few days. When she arrived, he put two of his bags in the trunk and did not see the toolbox or smell anything unusual. He denied having

cooked methamphetamine earlier in the day. Appellant stated that he did not know how to make methamphetamine and had never seen anyone cooking it. He testified that he was just a drug user. According to him, he did not know the toolbox was in James's car and did not see her take a toolbox out of the car. He knew nothing about the Coleman fuel can either.

Shirley Rookard, appellant's mother, then testified that appellant had been staying with her and that James was coming to pick him up that night. She said appellant took two bags with him and that she did not see him with a black toolbox.

Defense counsel renewed his motion for a directed verdict. He stated that the accomplice testimony was not corroborated by other evidence and that the State had failed to prove possession. The trial court again denied counsel's motion. The trial court then denied counsel's renewed request that the court instruct the jury that possession of methamphetamine is a lesser-included offense of manufacturing methamphetamine. The trial court specifically noted that the instruction was an incorrect statement of law and that the two separate and distinct causes of action contained different elements.

The State then presented a rebuttal witness. Freddie Gatlin, who was currently residing at the Arkansas Department of Correction, testified that appellant knew how to cook methamphetamine and that he had seen appellant "smoke some off." On cross-examination, Gatlin stated that he held appellant and James responsible for his getting "busted" by the Drug Task Force.

The trial court then prepared to instruct the jury. Appellant proffered the following instruction on constructive possession:

When, you the jury, are considering the question of constructive possession of a controlled substance, you may consider the following factors in determining whether the State has proven beyond a reasonable doubt the charge of constructive possession;

- (1) were the items of contraband in plain view
- (2) were the items found in the defendant's personal effects
- (3) were the items found on the same side of the car seat as the defendant or in close proximity to it
- (4) did the defendant have dominion and control over the items of contraband
- (5) did the defendant act suspiciously before or during the arrest

The trial court refused to read the instruction to the jury because it was not a model instruction and because there was a sufficient explanation under AMI 6404 as to what constituted constructive possession.

After the jury found appellant guilty on all counts, defense counsel alleged juror misconduct. The jury returned to deliberations on sentencing, and a hearing on defense counsel's allegation was held.

Mary Jo Weysham, appellant's sister, told the trial judge that during a recess she saw James's mother and sister speaking to two jurors. She stated that she could not hear what they said but that they made hand motions. After the jury returned with its recommendations on sentencing, the trial judge asked Weysham to point out the two jurors to whom she was referring. Weysham indicated which jurors she had accused of speaking to James's family members. One of the jurors stated that she did not say a word and was sitting quietly. Appellant was subsequently sentenced.

Appellant filed a motion for a new trial on May 2, 2005, on grounds that the verdict was against the law or the evidence; there was juror misconduct; he was denied his constitutional right against double jeopardy when he was sentenced for and convicted of both possession and manufacturing; and there was a cumulative effect of denying him a fair trial.

Also on May 2, 2005, appellant filed a Rule 37 petition for postconviction relief, alleging that his right of protection against double jeopardy had been violated. On May

20, 2005, in dismissing appellant's petition for Rule 37 relief and finding that the petition did not require a hearing, the trial court entered an order further finding that:

The Court will not substitute its judgement for the judgement of the jury when it comes to a determination of the facts. There was sufficient evidence presented for the jury to determine that the defendant was manufacturing methamphetamine in the tool box from the trunk and possessed the other methamphetamine found in the vehicle. Therefore no double jeopardy argument exists.

On May 26, 2005, a hearing on appellant's motion for a new trial was held.

Regarding the alleged juror misconduct, Weysham testified and repeated her previous allegations. Lynn White, one of the accused jurors, testified that she did not speak to James's mother or sister and that she only told another juror with whom she had been sitting that they were to return to the jury room with the others. The trial judge stated, "The Motion for a New Trial on the allegations raised in that motion including jury misconduct on communication during the trial and the other allegations that give rise to that motion are denied" because there were insufficient facts on which to establish that error was committed. Subsequently, the trial judge filed an order on June 1, 2005, in which he stated:

Now on this day comes on for hearing the defendant's motion for a new trial based on juror misconduct, . . . the Court doth find:

1. That there is no evidence of juror misconduct.
The motion for a new trial is denied.

Although appellant's motion for Rule 37 relief had already been denied, the trial court reconsidered it briefly at the hearing on the motion for new trial. The trial court pointed out that defense counsel had argued double jeopardy at trial, and counsel agreed that he had nothing else to add to that argument. Defense counsel then raised an objection to the wording of the trial court's order, namely, that methamphetamine was found in the car. Counsel stated that there was no evidence whatsoever that methamphetamine was found anywhere other than inside the toolbox that the officers

found in the woods. The trial judge replied that an officer testified that there was a syringe in James's purse that would have been in close proximity to appellant inside the vehicle. Counsel pointed out that only marijuana was found in James's purse. The judge responded, "And there was testimony of a syringe in the vehicle." Counsel argued that the only evidence came from James, whose accomplice testimony was not corroborated by other evidence. The trial court reiterated that appellant's petition for Rule 37 relief was denied.

Sufficiency Challenge

Although it was listed as appellant's third point on appeal, this court considers challenges to the sufficiency of the evidence before we address other allegations of trial error. *See Hunter v. State*, 300 Ark. 198, 952 S.W.2d 45 (1997). Appellant argues that the evidence was insufficient to support his convictions and that the only evidence connecting him to any crime was the fact that he was merely in James's car. Arkansas Rule of Criminal Procedure 33.1 provides that in a jury trial, a motion for a directed verdict shall be made at the close of the evidence offered by the prosecution and at the close of all of the evidence. Rule 33.1(c) provides that the failure of a defendant to challenge the sufficiency of the evidence at the times and in the manner required will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the verdict or judgment. According to *Doss v. State*, 351 Ark. 667, 97 S.W.3d 413 (2003), where an appellant failed to renew his motion for directed verdict at the close of the State's rebuttal evidence, which was "the close of all the evidence," the supreme court held that it was precluded from reviewing Doss's argument challenging the sufficiency of the evidence. Likewise, we do not address appellant's argument because he failed to challenge the sufficiency of the evidence at the proper times pursuant to Rule 33.1.

Ineffective Assistance of Counsel

Appellant argues that his trial counsel was ineffective in that he failed to move for a directed verdict after the State presented rebuttal evidence. He states that, “It is not contended that the absence of the motion for directed verdict would have made any difference in the result of the trial, or that the defendant, Robert Ross, was prejudiced at trial. However, the prejudice to Robert Ross comes in the form of a denial of procedural due process in that he is now unable to preserve his right to challenge the sufficiency of the evidence in this Court.”

This court will not consider ineffective assistance as a point on direct appeal unless that issue has been considered by the trial court. *Ratchford v. State*, 357 Ark. 27, 159 S.W.3d 304 (2004). Additionally, the facts surrounding the claim must be fully developed, either during the trial or during hearings conducted by the trial court. *Id.* The reason for this rule is that an evidentiary hearing and finding as to the competency of appellant’s counsel by the trial court better equips the appellate court on review to examine in detail the sufficiency of the representation. *Id.* Moreover, the trial court is in a better position to assess the quality of legal representation than we are on appeal. *Id.*

Where ineffective assistance of counsel is asserted, the reviewing court must indulge in a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance. *McGehee v. State*, 348 Ark. 395, 72 S.W.3d 867 (2002). To rebut this presumption, the petitioner must show that there is a reasonable probability that, but for counsel’s errors, the factfinder would have had a reasonable doubt respecting guilt in that the decision reached would have been different absent the errors. *Thomas v. State*, 330 Ark. 442, 954 S.W.2d 255 (1997). A reasonable probability

is one that is sufficient to undermine confidence in the outcome of the trial. *Id.* This court will not reverse the denial of postconviction relief unless the trial court's findings are clearly erroneous or clearly against the preponderance of the evidence. *Green v. State*, 343 Ark. 244, 33 S.W.3d 485 (2000). A general claim of ineffectiveness with no showing of actual prejudice will not warrant relief. *Johnson v. State*, 321 Ark. 117, 900 S.W.2d 940 (1995).

Appellant's claim of ineffective assistance of counsel is not preserved because appellant did not present his claim to the trial court for its consideration. *See Ratchford, supra*. The only ground for appellant's Rule 37 petition was the double-jeopardy issue. In any event, appellant admits that his counsel's error in failing to renew the directed-verdict motion after the State's rebuttal evidence would not have changed the outcome of the case; therefore, he is not entitled to relief. *See Johnson, supra*.

New-Trial Motion

Next, appellant argues that the trial court clearly erred in denying his motion for a new trial. Appellant relies on Ark. Code Ann. § 16-89-130, which provides that:

(c) The court in which a trial is had upon an issue of fact may grant a new trial when a verdict is rendered against the defendant by which his substantial rights have been prejudiced, upon his motion, in the following cases:

- (1) Where the trial in the case of a felony was commenced and completed in his absence;
- (2) Where the jury has received any evidence out of court other than that resulting from a view as provided in this code;
- (3) Where the verdict has been decided by lot, or in any other manner than by a fair expression of opinion by the jurors;
- (4) Where the court has misinstructed or refused to properly instruct the jury;
- (5) Where the verdict is against law or evidence;
- (6) Where the defendant has discovered important evidence in his favor since the verdict;
- (7) Where, from the misconduct of the jury, or from any other cause, the court is of opinion that the defendant has not received a fair and impartial trial.

Appellant contends that (4), (5), and (7) apply to his situation. The decision whether to grant or deny a motion for new trial lies within the sound discretion of the trial court. *Jones v. State*, 355 Ark. 316, 136 S.W.3d 774 (2003). We will not reverse a trial court's order granting or denying a motion for a new trial unless there is a manifest abuse of discretion. *Smart v. State*, 352 Ark. 522, 104 S.W.3d 386 (2003). Moreover, we will not reverse a trial court's factual determination on a motion for a new trial unless it is clearly erroneous, and the issue of witness credibility is for the trial judge to weigh and assess. *Id.*

Regarding (4), appellant argues that the trial court misinstructed the jury because possession of methamphetamine is necessarily a lesser-included offense of manufacturing methamphetamine, which resulted in the violation of his right against double jeopardy. Although appellant proffered an instruction for constructive possession, he did not proffer an instruction regarding lesser-included offenses. An appellant who seeks reversal based on the failure to instruct the jury as requested by the appellant must present a record showing a proffer of the requested instruction. *Newsome v. State*, 73 Ark. App. 216, 42 S.W.3d 575 (2001). Where the record does not contain any such proffer, we must affirm. *Id.* Appellant further contends that the trial court refused to give a joint-occupancy constructive-possession instruction. The trial court was not required to do so. Just because a proffered jury instruction may be a correct statement of the law does not mean that a trial court must give the proffered instruction to the jury. *Walley v. State*, 353 Ark. 586, 112 S.W.3d 349 (2003). In fact, a non-AMI instruction is only to be given when the AMI instruction does not correctly state the law or where there is no AMI instruction on the subject. *Id.*

Regarding (5), appellant challenges the sufficiency of the evidence convicting him. Arkansas Rule of Civil Procedure 50(e) provides that when there has been a trial by jury, the failure of a party to move for a directed verdict at the conclusion of all the evidence, because of insufficiency of the evidence, will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the jury verdict. The Reporter's notes indicate that Rule 50(e) was amended in 1983 to omit reference to the motion for a new trial as a means of challenging the sufficiency of the evidence. Thus, appellant's argument is not preserved for our review.

With regard to (7), appellant argues that Weysham testified that she saw two jurors speaking to James's mother and sister after James's testimony and that James's mother had given a "high-five motion" to the two jurors. Appellant asserts that it is reasonable to assume that the jurors believed James's testimony and empathized with her, especially if they had experienced a history of domestic violence as James had alleged she did. Here, the trial court obviously did not believe Weysham's vague allegations. Essentially, Weysham did not hear anything that was said and simply made assumptions about what she allegedly saw. On the other hand, one of the jurors denied outright saying anything at all to James's relatives. The trial court determines the credibility of witnesses. *See Smart, supra*. Under these circumstances, we cannot say that the trial court abused its discretion in denying appellant's motion for a new trial.

Cumulative Error

Finally, appellant argues that the trial court committed cumulative error in that: (1) the prosecutor made prejudicial remarks in his opening statement regarding his opinion that methamphetamine was the worst drug in existence and that it was invented by the Nazis; (2) his double-jeopardy right was violated; (3) there was juror misconduct; (4) the

jury failed to follow the law in that accomplice testimony alone was insufficient to convict him; (5) the jury should have considered the relevant factors in a joint occupancy automobile possession case; and (6) a jury instruction on constructive possession in joint automobile occupancy cases was proffered and denied. Appellant argues that he raised the objections at trial and in his motion for a new trial. He contends that the only other cumulative error was the judge's mistaken assumption that the loaded syringe was found in the vehicle.

We have previously held that an appellant asserting a cumulative-error argument must show that there were objections to the alleged errors individually and that the cumulative-error objection was made to the trial court and a ruling obtained. *Willis v. State*, 334 Ark. 412, 977 S.W.2d 890 (1998). Although appellant objected to the alleged errors individually at trial and raised the cumulative-error argument in his new-trial motion, he did not obtain a specific ruling on it. In his ruling from the bench, the trial judge referenced "other allegations" in appellant's motion, but the order entered addressed only the allegation of juror misconduct. It was appellant's obligation to obtain a ruling in order to preserve this issue for review. *See Beshears v. State*, 340 Ark. 70, 8 S.W.3d 32 (2000). Because appellant failed to obtain a ruling and because no errors accumulated, we affirm on this point.

Affirmed.

GRIFFEN and NEAL, JJ., agree.